ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED
OCT 16 1998
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Deployment of Wireline Services	)	**CC Docket No. 98-147**
Offering Advanced Telecommunications	)	
Capability	)	

TO: The Commission

REPLY COMMENTS OF EXCEL TELECOMMUNICATIONS, INC.

Excel Telecommunications, Inc. ("Excel"), by its attorneys, hereby submits these reply comments in response to the rulemaking portion of the FCC's *Memorandum Opinion and Order, and Notice of Proposed Rulemaking* ("*NPRM*") in the above-captioned proceedings. Excel is the fourth largest long distance carrier in the United States in terms of presubscribed lines, and it is one of the fastest-growing providers of telecommunications services in the nation. Through resale, and increasingly through the use of its own facilities, Excel offers a full range of residential and business telephony, and it has been certificated as a competitive local exchange carrier ("CLEC") in 32 states. At the end of 1997, Excel and its subsidiaries provided service to more than 5.5 million customers, most of whom are residential customers. Upon the completion of its merger with Teleglobe Inc. later this year, Excel will be one of the world's foremost providers of domestic and international telecommunications services.

These reply comments do not address the wide range of issues raised in the *NPRM* and the comments. Instead, Excel would like to focus upon the critical issue of whether the public interest would be promoted by enabling incumbent local exchange carriers ("ILECs") to provide advanced communications services through largely

unregulated affiliates. The record shows that the ILECs and CLECs, each for different reasons, agree that the FCC's proposal would harm rather than promote the public interest. Excel will go one step further -- neither the *NPRM* nor any comments point to even one significant public benefit from the separate affiliate approach, while the parties collectively identify numerous deficiencies. Based on this record, Excel strongly urges the FCC to set aside the separate affiliate approach, and instead to implement the statute, as written, to ensure that ILECs provide advanced services on an integrated basis fully subject to the market-opening requirements of Section 251(c).

I. NO PUBLIC INTEREST REASONS SUPPORT THE SEPARATE AFFILIATE APPROACH

ILECs and CLECs agree that the separate affiliate approach does not promote the public interest. From the ILECs' perspective, there are no technical, operational or business reasons to prefer providing advanced services through separate affiliates rather than on an integrated basis. To the contrary, the ILECs believe that the separate affiliate approach would needlessly force them to incur massive additional costs, while preventing them from realizing efficiencies that would be available if they provided advanced services on an integrated basis. *E.g.*, Bell Atlantic Comments at 18-19; 21-22; 25; BellSouth Comments at 13-15; GTE Comments at 37-38; 40-41; SBC Comments at 6; USTA Comments at 4-5; U S West Comments at 17. The only arguable benefit to the ILECs of the separate affiliate approach is that it would enable them to escape the market-opening requirements of Section 251(c). However, the ILECs' *private* interests must not be confused with the broader *public* interest. It is no reason to adopt the

separate affiliate approach that ILECs may be willing to incur unnecessary costs and sacrifice perceived efficiencies so that they can provide monopoly advanced services free from the requirements Congress imposed upon such services in Section 251(c).

The CLECs (including Excel) also have compelling objections to the separate affiliate approach. The FCC correctly held in the *Memorandum Opinion and Order* (at ¶¶ 32-64) that the market-opening provisions in Section 251(c) -- interconnection, unbundled network elements, and local exchange resale – apply to the ILECs' advanced communications services. 47 U.S.C. §§ 251(c)(2)-(4). However, the separate affiliate approach would allow the ILECs to negate those provisions by moving their advanced services and underlying infrastructure into affiliates which are outside the ambit of Section 251(c). *E.g.,* e.spire Comments at 6; MCI WorldCom Comments at 17-26; Westel Comments at 2. As a result, CLECs would be limited in their ability to use the ILECs' existing local exchange networks to enter the advanced services market, thereby crippling competition in this critical sector. The ILECs' use of affiliates also would exhaust prematurely scarce central office resources (*e.g.,* physical collocation space), thereby foreclosing entry and inhibiting local competition. *E.g.* CompTel Comments at 6-8.

Further, the separate affiliate approach would compound rather than reduce the FCC's difficult task of implementing and enforcing the statute's market-opening provisions. To date the ILECs have thwarted competitive entry by defying the statute and the FCC's implementing rules with impunity. The separate affiliate approach entails a complex regulatory regime that cannot work unless it is rigorously enforced. *E.g.,* ALTS Comments at 38-39; Comments of Ad Hoc Telecommunications Users Committee

at 13-15. Rather than comply voluntarily with rigorous separation requirements, the ILECs can be expected to seize every opportunity to force the industry and the FCC to spend enormous sums litigating the lawfulness and meaning of these new regulations. It will not alleviate the enforcement problems with the current regime for the FCC to establish a complex, new regulatory structure that will be just as difficult to enforce.

The FCC's goal in this proceeding is, as Section 706(a) states, to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans." The separate affiliate approach would impede that objective, not promote it. The ILECs concede that the needless costs and inefficiencies of using separate affiliates will reduce their investment in the infrastructure necessary for advanced services. *E.g.,* BellSouth Comments at 13; GTE Comments at 1-2; 25-27; 37-38. The ILECs' arguments that they will not invest in this market sector while subject to Section 251(c) is the modern-day telecommunications equivalent of the "missile gap" -- it is empirically invalid and contrary to common sense. The record shows that the ILECs have made and continue to make significant investments in the necessary infrastructure under the current regime, and it is not believable for them to argue that they would rather ignore this ultimate growth industry altogether than enter it in compliance with Section 251(c).

As for CLECs, plainly the separate affiliate approach would impede their participation in the advanced services sector because they would be foreclosed from this market segment except when they build their own facilities or can make do with the ILECs choose to provide as unbundled network elements. By contrast, implementing the statute as written would give CLECs the choice of entering the advanced services market

through their own facilities or the ILECs' advanced services infrastructure, as Congress intended when it adopted Section 251(c).

At bottom, the FCC has only two options to choose from. One option is to ensure that the ILECs provide advanced services on an integrated basis subject to Section 251(c). The other option is to permit the ILECs to provide advanced services on an integrated basis without complying with Section 251(c).[1] As between those two options, the FCC already selected the first and rejected the second in the *Memorandum Opinion and Order*. Congress intended that the ILECs' advanced services would be fully subject to Section 251(c), and it forbade the FCC from removing those provisions until after the ILECs have complied with them fully. The record in this proceeding confirms that the statutory approach is the only one that will serve the public interest by promoting the reasonable and timely deployment of advanced services to U.S. consumers.

II. THE FCC SHOULD INTERPRET THE TERM "SUCCESSOR OR ASSIGN" TO PROMOTE CONGRESS' PRO-COMPETITIVE GOALS

The FCC should construe the scope of the ILEC requirements in Section 251(c) to promote Congress' intention that the ILECs' advanced services and underlying infrastructure would be available for new entry by competitive carriers. According to

---

[1] Several ILECs argue that they should be permitted to provide advanced services subject only to the limited separation requirements established in the *Competitive Carrier* proceeding. *E.g.,* BellSouth Comments at 34-35. However, in a market environment where the ILECs have persistently refused to open their bottleneck local exchange networks to competitive entry in compliance with the statute and the FCC's rules, the limited *Competitive Carrier* requirements would be little different from permitting the ILECs to provide advanced services on an integrated basis without complying with Section 251(c).

Section 251(h)(1)(B)(ii), Section 251(c) applies to an ILEC and any "successor or assign." 47 U.S.C. § 251(h)(1)(B)(ii). It is well-established that the terms "successor" and "assign" can have a broad or narrow meaning depending upon the legal context. *E.g., Howard Johnson Co., Inc. v. Detroit Local Joint Executive Board,* 417 U.S. 249, 264 (1974) (no single definition of the term "successor"); *Oregon Ry. & Navigation Co. v. Oregonian Ry. Co.,* 9 S. Ct. 409, 415 (1889) (the term "assigns" is a "very loose and indefinite term"). Excel urges the FCC to accord those terms their broad natural meaning to remove the ILECs' incentive to establish separate affiliates solely for the purpose of evading Section 251(c). *E.g.,* AT&T Comments at 6; CompTel Comments at 10-11. In particular, the FCC should construe those terms to apply to ILEC affiliates who obtain any advantage from their ILEC parents. For purposes of determining when an affiliate obtains an advantage from its ILEC parent, Excel supports the rigorous separation requirements recommended in the comments filed by CLECs and their industry associations. *E.g.,* AT&T Comments at 17-38; ALTS Comments at 17-37; CompTel Comments at 14-35; MCI WorldCom Comments at 26-45. Only when those requirements are fully satisfied can an ILEC's affiliate be truly regarded as a CLEC which is not governed by the market-opening provisions in Section 251(c).

This approach to construing the statutory phrase "successor or assign" is fully consistent with the FCC's recent decision that certain teaming arrangements violate the Section 271 prohibition against a Bell Company's provision of in-region interLATA services prior to opening its local markets in compliance with statutory standards. *AT&T Corp. v. Ameritech Corp., et al.,* File Nos. E-98-41/42/43, FCC 98-242, rel. Sept. 28, 1998. In that decision, the FCC held that the critical statutory term "provide" can have

"multiple and related meanings." *Id.* at ¶ 33. As a result, the FCC selected the meaning that best promoted Congress' desire for Section 271 to enhance the Bell Companies' incentive to comply with the market-opening provisions in Section 251(c). The FCC struck down the teaming arrangements in question because they conferred "competitive advantages" which materially diminished the Bell Companies' incentive to open their local markets. *Id.* at ¶ 37. The FCC must adopt the same approach here. It should adopt a broad, natural reading of the term "successor or assign" to ensure that affiliates which obtain any advantage from their ILEC parents are deemed ILECs and, hence, subject to Section 251(c).

CONCLUSION

For the foregoing reasons, Excel urges the FCC to set aside the separate affiliate approach and to take the actions necessary to ensure that ILECs provide advanced services on an integrated basis subject to Section 251(c).

Respectfully submitted,

EXCEL TELECOMMUNICATIONS, INC.

By: _____
Robert J. Aamoth
KELLEY DRYE & WARREN LLP
1200 Nineteenth Street, N.W
Suite 500
Washington, D.C. 20036
(202)-955-9600

Its Attorneys

James M. Smith
Vice President, Law & Public Policy
EXCEL COMMUNICATIONS, INC.
1133 Connecticut Avenue, Suite 750
Washington, D.C. 20036

October 16, 1998

CERTIFICATE OF SERVICES

I, Marlene Borack, hereby certify that on this 16th day of October, 1998, I caused true and correct copies of the foregoing REPLY COMMENTS OF EXCEL TELECOMMUNICATIONS, INC. to be served via hand delivery upon those persons listed below.

Janice Myles
Federal Communications Commission
1919 M Street, N.W.
Room 544
Washington, D.C. 20554

James Casserley
Federal Communications Commission
1919 M Street, N.W.
Room 832
Washington, D.C. 20554

Kevin Martin
Federal Communications Commission
1919 M Street, N.W.
Room 802
Washington, D.C. 20554

Carol Mattey
Federal Communications Commission
1919 M Street, N.W.
Room 544
Washington, D.C. 20554

Kathryn C. Brown
Chief, Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W.
Room 500
Washington, D.C. 20554

International Transcription Service
Federal Communications Commission
1231 20th Street, N.W.
Washington, D.C. 20036

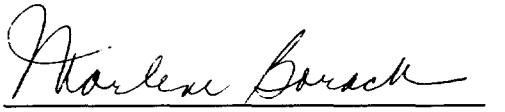
Thomas C. Power
Federal Communications Commission
1919 M Street, N.W.
Room 814
Washington, D.C. 20554

Kyle Dixon
Federal Communications Commission
1919 M Street, N.W.
Room 844
Washington, D.C. 20554

Paul Gallant
Federal Communications Commission
1919 M Street, N.W.
Room 826
Washington, D.C. 20554

Lawrence Strickling
Federal Communications Commission
1919 M Street, N.W.
Room 658
Washington, D.C. 20554

Linda Kinney
Federal Communications Commission
1919 M Street, N.W.
Room 500
Washington, D.C. 20554



Marlene Borack